Filed 5/17/10 In re C.M. CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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| In re C. M., a Person Coming Under the Juvenile Court Law. | |
| YOLO COUNTY DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>M. M. et al.,<br><br>Defendants and Appellants. | C062589<br><br>(Super. Ct. No. JV09163) |

A. M. and M. M., father and mother of minor C. M., appeal from the juvenile court's jurisdictional/dispositional order which granted the parents reunification services but denied visitation. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 8, 2009, the Yolo County Department of Employment and Social Services (the department) filed a petition under

Welfare and Institutions Code[1] section 300, subdivisions (b) and (j) as to three-year-old C. M. The petition alleged that the parents' trailer home was unsafe, unsanitary, and uninhabitable; the parents engaged in domestic violence; C. M. had significant undiagnosed speech delays and had not received medical checkups in at least two years; and mother had failed to reunify with C. M.'s siblings in prior dependency proceedings. The petition also stated that father was an enrolled member of an Indian tribe and C. M. might be eligible for membership.

The department's detention report stated that on April 6, 2009, father contacted law enforcement to have mother placed on an involuntary mental health hold. Both parents seemed disoriented and mentally unstable. They admitted episodes of domestic violence. The home was filthy and unsafe for a child. C. M. was also filthy and appeared delayed in speech and social skills. Mother had previously had parental rights terminated as to three other children.

The juvenile court held a contested detention hearing on April 10, 2009; the parents were present and represented by counsel, and an Indian Child Welfare Act (ICWA) representative appeared by telephone on behalf of the Cheyenne River Sioux Tribe (as was also the case at later hearings). The social worker testified that mother had a substantial history of drug abuse, but the police were more concerned about father's mental

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[1] All further statutory references are to the Welfare and Institutions Code.

health than mother's. Police had been called to the home due to domestic violence more than once before April 8, 2009.

The juvenile court ordered C. M. detained and set a jurisdictional hearing on April 22, 2009.

At the jurisdictional hearing, the juvenile court was told that the tribe intended to intervene. The court ordered the parents to drug test that day; neither agreed to do so. The court then rescinded its order on the understanding that the tribe would be taking jurisdiction, but suspended the parents' visitation with C. M. until they agreed to testing.

On April 28, 2009, the tribe confirmed its intent to intervene. The juvenile court set a contested jurisdictional hearing on May 19, 2009.

The department's jurisdiction/disposition report recommended placing C. M. in out-of-home care, denying reunification services to mother under section 361.5, subdivisions (b)(10), (b)(11), and (b)(12) (failure to reunify with other siblings, to treat the problems that caused the failure, and being convicted of a violent felony), and obtaining psychological evaluations of father with the intent of denying reunification services to him under section 361.5, subdivision (b)(2) (mental disability). The report alleged:

Both parents had committed felonies, including several assaults in father's case. They had longstanding mental health and/or substance abuse problems which led to domestic violence; in addition, mother had "marginal" independent living skills,

and father had anger management problems. Father had threatened the tribal representative and the department social worker.

The parents' home was still unsafe for occupancy. C. M. was significantly overweight when detained. At age three, he spoke mostly in single words.

The parents had visited C. M. once, but after the court suspended visitation, they refused drug testing and referrals to treatment. However, on May 4, 2009, mother tested, with negative results; therefore she was scheduled for another visit with C. M.

The tribe had decided not to take jurisdiction for now, but C. M.'s adult half-sister, who lived in Oklahoma, and his great-aunt, who lived on a reservation in South Dakota, were possible placements.

I

*The Jurisdictional Hearing*

On May 19, 2009, the parents submitted on jurisdiction, and the juvenile court found the section 300 petition (as amended by agreement of the parties) to be true. The court stated that it intended to return C. M. to the parents if they obeyed the following orders: (1) the parents would drug test today; after mother had tested, she would be allowed to resume visitation; (2) father would receive anger management counseling; (3) the parents would undergo mental health assessments; and (4) they would also take parenting classes. The court set a review hearing on May 27, 2009. +

II

*The Review Hearing*

The social worker stated that both parents had tested positive for methamphetamine. The department recommended residential drug treatment for both, but so far a bed was available only for father at Friendship House.[2]

The juvenile court directed father to enter the residential treatment program. Father replied: "We'll take it to trial. [¶] . . . [¶] All these lies are wrong." He claimed the drug test was "not a 100 [*sic*] percent accurate," but did not explain how it could have been incorrect.

Mother's counsel said mother had scheduled an assessment for June 2, 2009, at the John H. Jones Community Clinic, and was willing to engage in services in the meantime. Father's counsel said father was enrolled for counseling and therapy at the Sacramento Native American Health Center, but it had not yet been scheduled.

The juvenile court scheduled a contested dispositional hearing on June 16, 2009. The court ordered that the parents not receive visitation until they were in residential or outpatient substance abuse treatment, whichever was available first.

The tribe's ICWA representative said that father had called their office and made "disturbing" comments. Father denied it.

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[2] Friendship House is a Native American facility. Mother is not a Native American.

At the end of the hearing, father addressed the court, demanding to know how they could "take him from us." He then left the courtroom.

III

*The Trial Readiness Conference*

In response to father's previous outburst, the court said it had not decided yet whether to "take your child away from you," but it had "made certain orders," father had "decided to do what you think is in your best interest," and the court would "do what I think is best for your child." The court reiterated that visitation was suspended until the parents got drug treatment. Finally, at the request of C. M.'s counsel, the court ordered both parents to drug test that day.

IV

*The Contested Dispositional Hearing*

The court denied mother's request to reconsider visitation because the parents had not yet started treatment.

The court received two addendum reports and a declaration from ICWA expert Sean Osborn in evidence, and heard testimony from Osborn and social worker Laura Nielsen.

The first addendum report, dated May 27, 2009, stated that C. M. was now in a foster home arranged through the Tribal and Economic Social Solutions Agency (TESSA).

The social worker had located several agencies that could offer drug treatment and services to the parents. Both parents tested positive for methamphetamine on May 19, 2009. Mother

admitted she had relapsed, but refused a bed in a residential program, saying she would consider only outpatient treatment.

The parents received an "impromptu" visit with C. M. on May 19, 2009. The social worker who supervised the visit noted that C. M. had little facial expression when he saw his parents. They repeatedly questioned him about whether he was being hurt or abused in foster care, despite the social worker's attempt to redirect their focus. Mother used corporal punishment on C. M. during the visit; the parents rejected the social worker's criticism of this practice and said they would do it when they saw fit. When C. M. did not do as they wished, they repeatedly threatened to leave, and father actually did so. They refused to sign the "homework sheet" the social worker had left for them.

At another visit with C. M. two days later, father became agitated and stormed out. Afterward, the parents followed the car transporting C. M. and father yelled profanities at it.

The second addendum report, dated June 16, 2009, stated that the social worker had found a residential treatment bed for mother and had notified the parents and their counsel, but had not received responses. The Sacramento Native American Health Center said it could provide posttreatment services (other than parenting classes, for which funding had been cut) for both parents, but mother's services would need to be paid for privately. Mother failed to attend the intake scheduled at John H. Jones Community Clinic on June 2, 2009. The social

worker did not know of any efforts by the parents to enter treatment.

The declaration of Sean Osborn, a social worker with training and experience in ICWA, recommended the continued removal of C. M. from his parents.

When Osborn interviewed the parents, father denied methamphetamine use and explained his positive test by claiming he had "put meth in the sample." Mother claimed she did not know why her test came out positive.

Father said that when he and mother argue, he calls the police because he does not want to go to jail for a long time. During the interview, father repeatedly told mother to shut up.

Father said that if C. M. could not be returned immediately, "[i]t won't be a pretty site. I will do something about it." Father also said he did not intend to participate in services until C. M. was returned to his care.

Active efforts had been made to provide services to the family, but father was refusing to participate. Until the parents had addressed their anger and substance abuse problems and their home had been cleared by the state, C. M. would be at risk of serious emotional or physical harm if returned to them.

Osborn and Nielsen testified in keeping with their written submissions. Nielsen explained that father had been asked to drug test six times and had done it once, with a positive result; mother had tested three times with one positive result and two negative results.

Nielsen testified that when C. M. was removed from the parents' home, he was more obese than he had been on prior visits by the department, and he had speech problems which were still unresolved. He did not engage with people as much as a typical three year old would. During the parents' first visit, he had seemed more engaged, but then had a tantrum afterward; during their second visit he was distant toward mother.

Nielsen opined that C. M. would be at substantial risk if returned to the parents because their home was still posted as uninhabitable, they were substance abusers in need of treatment, "they both appear to have mental health issues that cause them to be impulsive and volatile," and father in particular had "an incredible flash anger problem" which could be dangerous even in a controlled visitation setting if unfamiliar people were there.[3] Furthermore, they unrealistically denied that C. M. had had any speech or behavior problems before his removal. Father had consistently rebuffed Nielsen and reacted violently when she tried to speak to him. So far as she knew, the parents had not only refused treatment but had also failed to attend AA or NA. Nielsen believed they would not engage in court-provided services (which would not help them anyway unless they got drug treatment first).

C. M.'s original foster parents reported that he slept poorly, spoke only a word or two at a time, and screamed a lot.

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[3] Father interrupted: "They've got my son. That's why."

Further evaluation would be needed to determine the causes of these behaviors.

The parents' use of corporal punishment during a supervised visit was highly unusual, and their disregard of the social worker's advice on the subject caused concern. It was also worrying that they rejected all counseling about C. M.'s problems and insisted he had had none before he was removed from their home; this denial had kept him from being referred earlier for speech therapy. Furthermore, the combination of father's impulsivity, "flash anger," and low frustration level with C. M.'s high energy was a risk in and of itself.

Before the hearing adjourned, the juvenile court reiterated that the parents needed to follow the court's orders if they wanted C. M. returned; otherwise "they don't give the Court any option."

The parents testified as follows:

On direct examination, father stated that he would undergo a substance abuse assessment the next day through the Sacramento Native American Health Center and that the problems with his trailer home were mostly fixed. He felt C. M. would be safer at home than in foster care. He had never harmed C. M. and never would. If C. M. were returned to him, he would follow the juvenile court's orders; otherwise, however, "[t]here is no guarantee."

On cross-examination, father said he had generally refused to drug test "[b]ecause I don't need it." He did not know why the one test he took was positive, since he does not use

methamphetamine. He did not tell Sean Osborn that he had put methamphetamine in the sample. He did not have to retest to prove the social worker wrong: "I know here in my own head I'm not dirty, that's all that counts to me." He did not believe mother needed drug treatment or had relapsed on methamphetamine.

He did not need mental health treatment. He was angry and "crazy," but only because his son had been taken from him. He did not trust the tribe -- they just wanted C. M. "for the money."

He was taking parenting classes at a community college, but it was not a class for parents of children with special needs because "[m]y son is not a special needs person." C. M.'s speech was not delayed, but "[h]e's not going to talk until he comes home."

If his son were returned to him, he would do court-ordered programs and services, but not before. Otherwise, "[w]hat is [the] use if [the court]'s not going to return him to me?" Asked repeatedly what he would do if his son were not returned immediately, he repeatedly answered: "My son will be home." He denied, however, that he had called the department and said he would come and get his son, or that he and mother had gone to TESSA.[4]

He burst out: "Why you people so intent on keeping my son. Why? What is it? Money. Is it numbers, you got to get so many

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[4] Mother admitted that they had gone there to get "information" about their son.

kids a year or something, what is it. God, I got to go through all this to get my own flesh and blood back. What is the deal with that? It doesn't hurt you, does it? You have no feelings. Well, I'm good. It is all gone."

On redirect examination, father was asked: "Well, you understand that sometimes the Court will require that you show that you can do some things before he's comfortable returning the child home, you understand that?" He replied: "Well, I would like to see them do some things before I feel comfortable doing their things."

Mother testified that she had tried unsuccessfully to get into programs. John H. Jones Community Clinic had just changed its recommendation from outpatient to inpatient treatment after assessing her drug history. River City Recovery required a tuberculosis test, which she could not afford, and a referral from the social worker. Admission to Sacramento Native American Health Services required funding, which the department would not provide.

According to mother, C. M. was doing well at home before his removal. He played outside every day, spoke in complete sentences and could make himself understood, showed no signs of autism, was not obese, and was meeting all developmental milestones. He was never injured at home, as he had been in the foster home. Although his last doctor's appointment was in 2007, he had seen a medical provider since then.

Mother admitted she had made the "mistake" of relapsing once on drugs, but did not want to go into the circumstances. Aside from that, she had been clean since 2002.

On cross-examination, mother blamed her relapse on the department's pressure and "continuous accusations of child abuse." She admitted there were times she had failed to drug test, but "[t]here was explanations that wasn't considered." The one time she got a positive test, she had gone in for testing "[o]ut of respect for the Judge."

Before the hearing adjourned, the juvenile court said it would not reinstate visitation merely because mother had had a substance abuse assessment. However, the court would reconsider if it could be sure that mother would attend visits alone or that father had begun to engage in services.

At this hearing, both parents unsuccessfully requested visitation. (Father's request was based on the claim that he had undergone substance abuse assessment at Sacramento Native American Health Center on July 14 and had complied with their recommendations.)

After the court started to explain why it would not permit visitation at this time, father interrupted: "Take me to jail, I'm through. I'm -- I can't have this, sir. I need to see my son." He then walked out of the courtroom.

The court explained to mother:

"This is not a situation where you're going to force the Court's hand, ma'am. . . . [M]y first concern is your son. And the manner in which and you and [father] have proceeded

throughout these court proceedings have indicated to this Court that you're more concerned about getting your own way than doing what's right for your son.

"You were in residential, I was encouraged by that, but you didn't stay and I was very disappointed in that.[5]

"I would consider visitation, if you were still in residential, because that is what I've asked you to do, but you refuse.

"[Father] has made threats and has tried to force the Court and other people to do what he wants; that isn't going to work. Each of you need to understand that this is a situation in which I'm very concerned about your son, and very concerned about each of your behaviors. I need to have indications that you are clear, that you have the ability to stay clean and sober for an extended period of time. I do not have that indication yet.

"I'm very concerned, as I've said, about the threats that [father] has made to take out people."[6]

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[5] The court was evidently relying on a third addendum report it had just received. (See fn. 6, *post*.)

[6] Mother denied father had done that. The court insisted he had, citing the third addendum report.

The report, dated July 31, 2009, stated that on July 23, father called the social worker to ask why she had told the Sacramento Native American Health Center's case manager that father needed residential treatment. He accused her of trying to sabotage him and mother by falsely claiming they were on drugs. He repeatedly demanded to see his son "NOW!" He said he knew where his son was and was going to go get him; he would "take out" anyone in his way. He said several times he would

The court then added:

"*My concern is that if the parents aren't willing to abide by Court restrictions and Court directives, that they will do something that will harm the son, that [they] will take the son and leave. So I'm concerned about that. They have not shown any indication that they are going to follow the Court's directives, until they do, I -- it's not just an enticement, it is the safety of the son that I'm concerned about.*

"*So your objection is noted, but my ruling still stands. No visitation until I can be convinced that it's in the best interest of this child, and I'm not convinced of that at this point in time, based on the actions of each of these parents*." (Italics added.)

Over the parents' objections, the juvenile court received the third addendum report in evidence. The minute order notes that both parents had left the courtroom, although the court had been prepared to give them an opportunity to explain their conduct. The court then continued the matter to August 3, 2009, for findings and orders.

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"kill or be killed if necessary to get his son." Finally, he hung up. Taking these threats seriously, the social worker notified TESSA, the foster parents, counsel, the West Sacramento Police Department, and the Sacramento Native American Health Center's case manager.

The report also stated that within two hours after this conversation, mother left her residential treatment. Calling from the same number father had called from, mother expressed anger that the social worker had discussed mother's history with River City Recovery.

The juvenile court found by clear and convincing evidence that there was a substantial danger to C. M.'s physical health, safety, protection, or physical or emotional well-being if he were returned home. The factual basis for his removal from the parents was that they had substance abuse issues, mental health issues, and an unsuitable living environment; in addition, mother had a longstanding history of abuse and neglect of her children, and father had significant anger issues. Neither parent had made any progress toward alleviating or mitigating these problems.

The court ordered C. M. placed confidential foster care. The court also ordered the parents to participate fully in the case plan devised by the department, and ordered father to participate in psychological evaluations.

DISCUSSION

Both parents contend: (1) the juvenile court erred by denying visitation because substantial evidence did not support this order; (2) the court violated their substantive due process rights by denying visitation in order to coerce their compliance with the reunification plan.[7] We disagree with both contentions.

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[7] Father raises the second contention without any proper argument heading or subheading. Therefore, we could deem it forfeited. (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.) However, because mother has raised it properly and the argument is the same as to both parents, we address it as to both.

I

*Substantial Evidence Supported The Order*

When the juvenile court places a child in foster care and orders reunification services, it shall also order visitation between the child and the parent or guardian, "as frequent as possible, consistent with the well-being of the child." (§ 362.1, subd. (a)(1)(A).) However, "[n]o visitation order shall jeopardize the safety of the child." (*Id.*, subd. (a)(1)(B).)

Because visitation is an essential component of a reunification plan, it may ordinarily not be denied without a showing of detriment. (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580.) In other words, the court may deny visitation under section 362.1, subdivision (a)(1)(B) only if it would be harmful to the child. (*In re S.H.* (2003) 111 Cal.App.4th 310, 317, fn. 9.)

On appeal, even where the juvenile court was required to apply the standard of clear and convincing evidence, we apply the substantial evidence standard of review, construing the evidence most favorably to the court's order and drawing all reasonable inferences to support it. (*In re Mark L.*, *supra*, 94 Cal.App.4th at pp. 580-581.)

According to a recent decision, while reunification is still possible, the juvenile court may restrict the frequency of visitation under section 362.1, subdivision (a)(1)(A) based on a global assessment of the child's "well-being," but may not deny visitation entirely under section 362.1, subdivision (a)(1)(B)

unless it finds that visitation would threaten the child's "safety," i.e., *physical* safety. (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1491-1492.) Even assuming section 362.1, subdivision (a)(1)(B) requires a finding that visitation would jeopardize the child's physical safety, the juvenile court could properly have made that finding here. Substantial evidence showed not only that C. M.'s physical safety required his removal from the parents' custody, but that their subsequent conduct gave the juvenile court every reason to think visitation could jeopardize his safety again.

At the time of removal, the parents had jeopardized C. M.'s safety by maintaining a dangerous and uninhabitable residence and by neglecting his health and cleanliness. This dangerous neglect apparently sprang from their longstanding substance abuse, domestic violence, and mental instability, which blinded them to the peril in which they had put their son.

After C. M. was placed in foster care, the parents not only failed to change their conduct significantly, but angrily denied that they needed to do so and blamed the social workers and the juvenile court for C. M.'s problems and their own. Both continued to test positive for methamphetamine, yet father absurdly denied using drugs, while mother tried to foist responsibility for her lapse on the department. Both actively resisted treatment. Father proclaimed that he would not enter a treatment program or do anything else the court and the department deemed necessary so long as C. M. was out of his custody; mother abandoned a residential program almost as soon

as she was admitted to it. Father violently threatened anyone he thought responsible for keeping C. M. from him. Mother supported father at every step, agreeing with his views and simply denying his most outrageous actions, no matter how well documented. These facts could have led the court to conclude that allowing the parents to spend any time in proximity to C. M. at this point, even in supervised visitation, could be dangerous to him.

Furthermore, when allowed to visit C. M., father repeatedly erupted in anger at C. M.'s failure to comply with father's wishes and walked out. Both parents asserted the right to use corporal punishment in defiance of the social worker's advice. As social worker Nielsen testified, father's explosive anger and low frustration tolerance, combined with C. M.'s high activity, was a red flag in itself. All of this evidence pointed to the conclusion that allowing visitation when the parents had done nothing to change their ways and denied that any change was needed could jeopardize C. M.'s safety.

Finally, as the juvenile court pointed out, father's repeated threats to take his son from anyone who had him, by violence if necessary ("kill or be killed"), made it reasonably foreseeable that the parents might use visitation as an opportunity to abduct C. M. from the custody of his foster parents and the department, putting him in immediate physical danger.

Thus, even if the juvenile court could deny visitation only by finding that it would jeopardize C. M.'s physical safety (*In*

*re C.C.*, *supra*, 172 Cal.App.4th at pp. 1491-1492), substantial evidence supports that finding here.

Mother cites *In re Dylan T.* (1998) 65 Cal.App.4th 765, for the proposition that the court was required to find by clear and convincing evidence that any particular factor it cited supported the denial of visitation. That decision is inapposite: it construes section 361.5, subdivision (e)(1), which requires clear and convincing evidence of detriment to justify denying visitation to an incarcerated parent. (*In re Dylan T.*, *supra*, 65 Cal.App.4th at pp. 769-771.) Section 362.1, which controls here, does not incorporate the clear and convincing evidence standard. In any event, whatever the standard required of the trial court, we need find only that substantial evidence supported its order. (*In re Mark L.*, *supra*, 94 Cal.App.4th at pp. 580-581.)

Mother asserts that nothing in *her* behavior *during the supervised visits with C. M.* warranted a finding that further visitation by her would jeopardize C. M.'s safety. We reject this contention. First, mother improperly construes the evidence she cites most favorably to herself. Second, the court did not need to restrict itself to that evidence: in light of the parents' united front throughout this litigation, the court had to consider mother's conduct at the visits in the context of father's conduct there and of both parents' conduct overall.

Father makes no separate arguments to show that the juvenile court's order was erroneous as to him. In fact, his "argument" on this issue amounts only to the bald assertion that

the court "did not set forth any specific facts upon which it based its denial of all visitation between appellant and his child." We have already shown that this is not the case.

Substantial evidence supported the juvenile court's order denying visitation.

II

*The Juvenile Court Did Not Improperly Deny Visitation To Coerce Compliance With The Reunification Plan*

Relying on *In re Nolan W.* (2009) 45 Cal.4th 1217, the parents assert that the juvenile court improperly used the denial of visitation to coerce compliance with the reunification plan. We disagree.

The juvenile court may order parents to undergo substance abuse treatment as part of a reunification plan. (*In re Nolan W.*, *supra*, 45 Cal.4th at p. 1224.) Here, all the evidence before the court showed that substance abuse treatment was the sine qua non of any attempt at reunification. Therefore, the court could properly order, as it did, that the parents must enter drug treatment before anything else tending toward reunification could occur.

Whether the parents were allowed visitation with C. M. was a separate question, the answer to which depended on whether the court found that it would jeopardize his safety. As we have explained already, the court's finding to that effect is supported by substantial evidence.

*In re Nolan W.* does not assist the parents. That decision holds only that a juvenile court may not properly punish a

parent for refusing to participate in a voluntary reunification case plan by incarcerating the parent for contempt of court. (*In re Nolan W.*, *supra*, 45 Cal.4th at p. 1224.) Since that did not happen here, *Nolan W.* is inapposite.

DISPOSITION

The judgment (order denying visitation) is affirmed.

ROBIE, J.

We concur:

HULL, Acting P. J.

BUTZ, J.